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No. 93-686

In The

Supreme Court of the United States

October Term, 1993

SARAH ANNE WILLIAMS, WAYNE WILLIAMS,
on behalf of their minor son,
JOHN WILLIAMS,

Petitioners,

v.

THE SCHOOL DISTRICT OF BETHLEHEM, PA.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

May the comprehensive equal protection remedies intended by Congress to be available under Title IX to victims of gender discrimination in federally-funded educational institutions be bypassed or duplicated by resort to the catch-all provisions of 42 U.S.C. § 1983?

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SARAH ANNE WILLIAMS, WAYNE WILLIAMS,
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THE SCHOOL DISTRICT OF BETHLEHEM, PA.,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

The Respondent School District of Bethlehem (hereinafter "School District") is a Pennsylvania public school district which offers its male and female students the opportunity to compete in a variety of interscholastic sports. The School District offers teams for boys in ten sports, teams for girls in ten sports, and co-ed teams in two sports. However, this level of competitive opportunity for girls has existed only since 1989, and is the result of continual efforts by the School District since 1968 to increase the range of opportunities for girls. Prior

to 1968, when nine sports teams were offered for boys, basketball was the only sport offered for girls.

Prior to 1975, neither boys nor girls in the School District were permitted to join teams designated for the opposite sex. Since 1975, School District policy has permitted girls to try out for and (if athletically qualified) compete on boys' teams, as is required under the ruling of the Pennsylvania Commonwealth Court in *Commonwealth by Packel v. Pennsylvania Interscholastic Athletic Association*, 18 Pa. Commw. Ct. 45, 334 A.2d 839 (1975). In *Packel*, the Commonwealth Court held that athletically qualified girls who desire to face the disadvantages and risks of competition on boys' sports teams must, under the Equal Rights Amendment to the Pennsylvania Constitution, be permitted to do so.[1]

The Pennsylvania courts have not yet examined whether Pennsylvania's Equal Rights Amendment, PA. CONST. Art. 1, § 28, requires that boys be allowed to try out for and compete on girls' teams. Present School District policy does not permit boys to try out for and compete on teams which are designated for girls. The School District maintains this policy because of the gross physiological differences between high school age males and females which provide males an unfair competitive advantage in athletic competition, an advantage which is most pronounced in contact sports such as field hockey.

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[1] The *Packel* ruling, as a matter of state law, effectively prohibits the School District from applying the contact sport rule contained in Title IX's implementing regulations at 34 C.F.R. § 106.41(b) to exclude girls from boys' teams in contact sports.

The School District believes that its policy is necessary to create and preserve an equal opportunity for girls to participate in interscholastic athletic competition, and to prevent boys from displacing girls from the available team positions and playing time. The School District also believes that its efforts to remedy previous inequity in its sports program would be set back if girls were forced to compete with boys for places on the girls' teams.

Petitioner John Williams is a high school senior who wants to play on the School District's girls' field hockey team, but who is ineligible for the team under the School District's policy because he is a boy. Williams tried to join the team in August, 1990, but was told he was ineligible for it in accordance with the School District policy. The School District does not have a boys' field hockey team.

After Williams brought suit to challenge the policy in October 1990, the District Court denied Williams' request for a preliminary injunction. In July, 1991, Williams moved for summary judgment in his favor, which the District Court granted on July 14, 1992, permanently enjoining the School District from excluding Williams from the field hockey team solely on account of his gender. 779 F.Supp. 513 (E.D. Pa. 1992). The School District appealed the District Court's decision to the United States Court of Appeals for the Third Circuit, which on July 6, 1992 reversed the decision of the District Court and remanded the matter for trial on disputed factual issues. 998 F.2d 168 (3d Cir. 1993).

The Court of Appeals denied Williams' petition for rehearing and rehearing en banc on July 30, 1993, and denied Williams' motion for stay of mandate on August

13, 1993. Williams' further application to this Court for a stay of the Court of Appeals' mandate was denied on September 15, 1993 by Justice David H. Souter, sitting as Circuit Justice. There have been no further proceedings in the District Court since the issuance of the Court of Appeals' mandate on August 13, 1993. The School District's girls' field hockey team played the last game of its 1993 season on October 20, 1993.

REASONS FOR DENYING THE WRIT

Summary.

The end of the final field hockey season in which the relief sought by Williams could benefit him has rendered this action moot, and the review Williams seeks can no longer produce anything but an advisory opinion. Even were this not the case, further examination of the decision below is unwarranted.

The statutory and regulatory structure of Title IX, including broad private remedies as well as detailed administrative mechanisms, creates a comprehensive and effective enforcement scheme carefully tailored to fully serve equal protection interests in the educational settings to which it applies. Unfocused and parallel private remedies under § 1983 are both unnecessary and damaging to Title IX's fulfillment of the purposes intended by Congress.

The Court of Appeals' conclusion that additional § 1983 remedies are not available to those benefited by

Title IX is fully in accord with the previous pronouncements of this Court regarding the comprehensiveness of Title IX and the intention of Congress that such context-specific remedies be the exclusive means of equal protection enforcement. No other circuit court has concluded to the contrary. Accordingly, the Petition for Writ of Certiorari should be denied.

1. The Petition Should Be Denied Because of the Absence of any Ongoing Case or Controversy.

The first obstacle to proper review in this case is that Williams' claim of entitlement to membership on the School District's girls' field hockey team has become moot. The last high school field hockey season in which Williams, a senior, might have participated is over. Williams cannot benefit from the injunctive relief he seeks, and the policy he challenges can never again exclude him from the School District's field hockey team.

Contrary to Williams' argument, the dispute in this case may not properly be described as capable of repetition yet evading review. The issues are not capable of repetition because there can be no reasonable expectation that Williams himself will be subject again to exclusion from the field hockey team pursuant to the School District's policy, and because Williams has never sought to represent a class of similarly situated persons. *See, DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) (per curiam); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam). This conclusion is not altered by Williams' speculative assertion that he may someday be denied membership, due to his gender, on a field hockey team at

an as-yet unknown university. This case concerned the validity of the School District's policy as it applies to high school athletes, and cannot be a proper basis for a purely prospective analysis of other policies and factual contexts.

This case is not of a nature that can be said to evade review, because neither Williams' claim nor the long-standing policy he challenges are so inherently short-lived that full review may never be had. The span of a high school athletic career is at least as long as the three years needed to enter and complete law school, a period not considered to be so short as to prevent review. *DeFunis*, 416 U.S. at 319.

Williams' interest in seeking attorneys' fees does not render dismissal for mootness any less appropriate. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990). The School District further submits that Williams should not now be permitted, *after* his claim has expired, to resuscitate this action by promising to later amend his complaint to include a damages claim. Although a properly pleaded claim for damages may avoid mootness, *See, Murphy v. Hunt*, 455 U.S. 478, 482 (1982), the School District is aware of no authority for the proposition that mootness may be reversed by claiming damages after the fact. Williams offers no reason why he did not claim damages under § 1983 at the outset of this action, nor why he has not amended his complaint to claim damages under Title IX since the Third Circuit's decision in December 1990 that such damages were available. *Pfeiffer v. Marion Center Area School Dist.*, 917 F.2d 779 (3d Cir. 1990).

Lacking any further personal stake in the outcome of this action, Williams essentially invites this Court to provide an advisory opinion speaking to policies and circumstances whose contours may only be surmised. Such an invitation should be refused.

2. The Court of Appeals Correctly Applied the *Sea Clammers* Doctrine to Title IX.

Mootness aside, the review requested by the Petition is not justified by any of the circumstances described in Supreme Court Rule 10.1. There is no conflict between the decision below and the decisions of other courts of appeals, nor is there a present need for this Court to elaborate further on the guidance, correctly applied below, provided in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981).

Of initial importance is the recognition that the *in terrorem* assertions made in the Petition are rooted in a distorted statement of the relevant inquiry. The primary question presented is not, as Williams contends, whether Congress intended to extinguish the right of individuals to sue to enforce equal protection rights. Correctly viewed, the question is instead whether Congress, in establishing a means of enforcing the Equal Protection Clause applicable to certain educational institutions, intended that the persons benefited thereby should be able to choose to bypass or duplicate such remedies by resort to the catch-all provisions of § 1983.

The Petition further clouds the issue by reference to situations involving institutions to which the prohibitions of Title IX of the Education Amendments of 1972, 20 U.S.

§ 1681 (1988) do not apply by virtue of specific statutory exemption. The question here is not whether Congress, by enacting Title IX and the limitations to its scope, had the intent or power to deny equal protection or a means of enforcing it to those specifically left outside the reach of Title IX. This Court answered that question in the negative in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), also stating that "[i]t is far from clear that Congress intended, through Section 901(a)(5), to exempt MUW from any constitutional obligation. Rather, Congress apparently intended, at most, to exempt MUW from the requirements of Title IX." 458 U.S. at 732. It is not the issue here, where the focus must be instead upon institutions such as the School District to which Title IX's protections do apply.

The Petition attempts to lead this Court further from the proper focus by mischaracterizing the decision below as one which may mean that "Title IX does not protect John Williams." Petition at 15. In deciding that Williams was not entitled to summary judgment on his Title IX claim under a proper reading of the statute's implementing regulations, the Court of Appeals raised no question as to whether Title IX "protects" Williams from unlawful gender discrimination. Since the School District is unquestionably an institution to which the protections of Title IX apply, Title IX clearly does protect Williams from such discrimination. The question the Court of Appeals remanded for trial is whether Title IX, in prohibiting gender discrimination, necessarily entitled Williams to be allowed to play field hockey under the circumstances of this case. This is a vastly different inquiry.

Once these pitfalls of reasoning are illuminated, it is easier to recognize the soundness of the Court of Appeals' earlier decision in *Pfieffer v. Marion Center Area School District* that resort to § 1983 is not available to a plaintiff whose equal protection interests may be enforced under Title IX. 917 F.2d at 789. It is the *Pfieffer* decision which the Court of Appeals followed in this case, without further analysis. Court of Appeals Opinion, Petition at 39a-42a, 998 F.2d at 176.

As this Court explained in *Smith v. Robinson*, 468 U.S. 992 (1984), § 1983 is a statutory remedy which Congress may replace with an alternative remedy. 468 U.S. at 1012. "The crucial consideration is what Congress intended." *Id.* In determining whether Congress intended to foreclose action under § 1983 when it provides a separate enforcement mechanism for a certain class of persons, it is not necessary that there have been an express statutory provision precluding resort to Section 1983; this intent may also be demonstrated where the alternative remedial scheme is sufficiently comprehensive. *Sea Clammers*, 453 U.S. at 20.

In protesting that this standard cannot be met by Title IX, Williams actually goes so far as to claim that Congress provided no express remedial scheme whatsoever. Petition at 11. The funding cut-off and other express enforcement mechanisms found at 20 U.S.C §§ 1682 and 1683 (1988) amply demonstrate that this is simply untrue. With respect to the absence of express authorization for private causes of action, Williams then fails to recognize that this Court has already answered the crucial question of what Congress *intended* Title IX to provide.

In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), this Court had little difficulty concluding that "the history of Title IX rather plainly indicates that Congress intended to create such a remedy." 441 U.S. at 694. In reaching this conclusion, the Court gave significant weight to the drafters' view of Title IX as a "strong and comprehensive measure." *Id.* at 704 n. 36 (quoting comments of Senator Bayh, at 118 Cong. Rec. 5806-5807 (1972)), as well as similar "authoritative expressions concerning the scope and purpose of Title IX and its place within the 'civil rights enforcement scheme' . . . ". *Id.* at 687 n. 7.

This Court subsequently clarified just how comprehensive Congress intended the private remedies under Title IX to be, when it explained in *Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S.Ct. 1028 (1992), that Congress intended that a private cause of action for compensatory damages be available under Title IX in addition to actions for injunctive relief. 112 S.Ct. at 1035-36. In so ruling, this Court found itself in agreement with the conclusion on that point reached by the Third Circuit in *Pfeiffer*, 917 F.2d at 787-789. *Franklin*, 112 S.Ct. at 1032.

It is the combined comprehensiveness of the express mechanisms contained in Title IX at 20 U.S.C. §§ 1682 and 1683, coupled with the private causes of action also intended by Congress, which demonstrates that Title IX was intended to supplant rather than supplement remedies under § 1983 with respect to sex discrimination in federally funded educational institutions. Taken as a whole, Title IX is not unlike the statutory and regulatory schemes addressed in *Sea Clammers* and *Smith v. Robinson*.

In one very important sense, remedies under Title IX may be said to be even more complete and effective in accomplishing their goals. In Title IX suits, Congress expressly authorized awards of attorneys' fees to prevailing plaintiffs when it enacted the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988 (1988 & Supp. III 1991), a remedy considered by Title IX's drafters as "essential" to private enforcement. *Cannon*, 441 U.S. 677, 685-687 nn. 6-7. By contrast, the Education of the Handicapped Act, 20 U.S.C. § 1415 (1988 & Supp. III 1991), did not provide for either a damages remedy or awards of attorneys' fees at the time it was examined by this Court in *Smith v. Robinson* and nevertheless found sufficiently comprehensive to preclude resort to § 1983. *Smith v. Robinson*, 468 U.S. at 1020. Similarly, because it provides a compensatory damages remedy, Title IX may also be viewed as a more comprehensive and complete remedy than the citizen suit provisions at issue in *Sea Clammers*, which permitted only prospective injunctive relief. *Sea Clammers*, 453 U.S. at 6; 33 U.S.C. §§ 1365(a), 1415(g) (1988).

Title IX is quite similar in its approach to the enforcement mechanisms established in the Age Discrimination in Employment Act ["ADEA"], 29 U.S.C. § 626 (1988 & Supp. IV 1992), which have been found by the First and Fourth Circuits to be sufficiently comprehensive to preclude resort to remedies under § 1983. *Zombro v. Baltimore City Police Dept.*, 868 F.2d 1364, 1366-67 (4th Cir. 1989), *cert. denied*, 493 U.S. 850 (1989); *Izquierdo Prieto v. Mercado Rosa*, 894 F.2d 467 (1st Cir. 1990); *accord, Ring v. Crisp County Hosp. Auth.*, 652 F.Supp. 477 (M.D. Ga. 1987). Once

again, Title IX should actually be viewed as more comprehensive than the remedies provided by the ADEA, under which general compensatory damages are not recoverable. *See, Rogers v. Exxon Research and Eng'g Co.*, 550 F.2d 834, 840 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

There is no merit in Williams' contention that Title IX and its regulations, as construed by the Court of Appeals in this case, fail to adequately serve equal protection interests. There is no constitutional infirmity in Title IX's recognition that male and female students are not similarly situated when they enter athletic competition. *See, e.g., O'Connor v. Board of Educ. of School Dist. 23*, 449 U.S. 1301, 1307 (Stevens, Circuit Justice 1980) ("Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events."). Nor would the Equal Protection Clause invalidate a scheme that refuses to allow males, who have long enjoyed greater athletic emphasis and opportunity, to wield their physiological advantages in programs set aside for the historically disadvantaged sex in order to rectify such inequality.

Permitting girls to voluntarily face the risks and disadvantages of competition on boys' teams is vastly different from allowing boys to join girls' teams in contact sports where such risks and disadvantages would be involuntarily imposed upon other female team members who have nowhere else to compete. Rules that recognize this are more likely to be required by the Equal Protection Clause than condemned by it.

Title IX and its regulatory structure are carefully tailored to address the particular concerns of avoiding and remedying gender discrimination in the context of educational programs. It would make no sense for Congress to have intended that sex-discrimination claims in educational settings could nevertheless be litigated under § 1983 without reference to that context-specific enforcement scheme. If Title IX is not the exclusive remedy for such claims, its mechanisms are rendered superfluous and the detailed guidance it provides to educators is of little practical value.[2] This Court should not accept Williams' invitation to foster such absurdity.

3. The Decision Below is Not in Conflict with Decisions of Other Courts of Appeal.

After acknowledging that no other circuit court of appeals has yet addressed the application of *Sea Clammers* to Title IX, Williams nonetheless posits that a conflict among the circuits exists in this regard. Petition at 20-22. Not even an exceedingly strained reading of the cases

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[2] Williams' argument that a different result is required by this Court's holding in *Franklin v. Gwinnett County Public Schools* misconstrues the plain language and limited extent of that decision. The Court's conclusion therein that "Congress did not intend to limit the remedies available in a suit *brought under Title IX*," 112 S.Ct. at 1036 (emphasis added), reaches no further than the remedial scope of Title IX itself, and implies nothing about what alternative statutory remedies may be combined with a cause of action under Title IX. Only the relief available under Title IX, the sole grounds invoked by the plaintiff for her suit, was at issue in *Franklin*.

Williams cites on this point can provide any basis whatsoever for the remarkable assertion that the circuits involved have "disagreed" with the Third Circuit on this issue.

Rowley v. Board of Education of St. Vrain Valley School District, 863 F.2d 39 (10th Cir. 1988), *vacated as moot and opinion withdrawn*, 863 F.2d at 41, was a challenge brought by a male student to the Colorado High School Activities Association's rules prohibiting boys from competing on girls' volleyball teams. The court of appeals reversed a preliminary injunction granted in favor of the plaintiff, because the district court applied a more stringent equal protection test than was appropriate for a gender-based classification. *Id.* at 40. Although the action was brought under both Title IX and § 1983, the court makes no mention of the *Sea Clammers* doctrine, an issue that was apparently not raised.

The remaining decisions relied on by Williams are similarly devoid of any discussion of the *Sea Clammers* doctrine, and cannot even be described as Title IX cases. In *Habetz v. Louisiana High School Athletic Association*, 915 F.2d 164 (5th Cir. 1990), the court considered a petition for attorney's fees filed by the female plaintiff after the merits of her challenge were rendered moot by the athletic association's amendment to its rule prohibiting girls from playing on boys' sports teams. The action was brought solely under § 1983, and could not have been a "Title IX case", because Habetz brought her challenge before the enactment of the Civil Rights Restoration Act of 1987, P.L. 100-259, 107 Stat. 28 (20 U.S.C. § 1687 (1988)) might have subjected the association to suits under Title IX. In reversing the district court's determination that it

lacked jurisdiction to consider her petition because the association was not a state actor, the Fifth Circuit expressly declined to reach Habetz's contention that the intervening passage of the Civil Rights Restoration Act provided an alternative jurisdictional basis under Title IX for the district court to consider her petition for attorney's fees under 42 U.S.C. § 1988. 915 F.2d at 166. The court of appeals ruled only that Habetz's jurisdictional claims under § 1983 were sufficiently colorable to warrant further determination by the district court of which party, if any, should be considered the prevailing party for § 1988 fee purposes. 915 F.2d at 167.

In *United States v. Massachusetts Maritime Academy*, 762 F.2d 142 (1st Cir. 1985), an action brought by the United States Attorney General under Title IV of the Civil Rights Act of 1964, 42 U.S.C. Section 2000c et seq. (1988), the question was whether the academy's exclusion from the reach of Title IX under the statutory exemption contained at 20 U.S.C. § 1681(a)(4) should also be read into Title IV as a limit on the Attorney General's powers under Title IV. 762 F.2d 142 at 147. There was no issue as to whether the existence of a Title IX remedy foreclosed resort to § 1983, because the institution in question was clearly exempted from the reach of Title IX, and no remedies existed under Title IX for anyone.

In *Bobal v. Rensselaer Polytechnic Institute*, 916 F.2d 759 (2d Cir. 1990) (dismissed on rehearing due to plaintiff's refusal to comply with procedural orders), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1404 (1991), the Second Circuit upheld the district court's dismissal of the female plaintiff's discrimination claims under § 1983 because she could not properly allege any state action. 916 F.2d at 763. The court

nevertheless speculated that the plaintiff might conceivably be able to plead a cause of action under Title IX (although she had not yet attempted to do so) and initially held that she should be afforded the opportunity to amend her complaint accordingly. *Id.* Once again, since the absence of state action prevented resort to § 1983 in the first place, there could be no issue of whether that remedy was foreclosed by the possible existence of a Title IX remedy.

It is clear that the decisions described above do not demonstrate any disagreement with the conclusions of the Third Circuit in this case. It is likewise clear that there is no merit to the Petition's prayer for review on that basis.

CONCLUSION

The comprehensiveness of Title IX's enforcement scheme and the exclusive nature such remedies must enjoy to serve their intended purposes are principles firmly established by the previous teachings of this Court. The decision of the Third Circuit Court of Appeals in this case, thus far unquestioned by any other circuit court of appeals, reflects faithful adherence to that guidance.

In such circumstances, particularly where Petitioners can no longer benefit from the sole relief sought, it is unnecessary and inappropriate for this Court to exercise its powers of review. Accordingly, the School District

respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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